No. 18838

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIMONEIRA COMPANY, a California corporation, ROGER DONLON, PAUL B. KERSTEN, and E. B. ANTONELL, et al.,

Appellants

vs.

W. WILLARD WIRTZ and ROBERT C. GOODWIN,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

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To the Honorable

RICHARD H. CHAMBERS, Chief Judge

WALTER L. POPE, Circuit Judge, and

GILBERT H. JERTBERG, Circuit Judge.

The appellants, LIMONEIRA COMPANY, a California corporation, ROGER DONLON, PAUL B. KERSTEN, and E. B. ANTONELL, et al., hereby petition for a rehearing to reconsider the judgment entered in this action on February 12, 1964, on the following grounds:

1. The court below erred in its decision. It held that there is no legal distinction between (1) the action of the Secretary of Labor in determining the prevailing wage and basing his adverse effect determination thereon, and (2) his action in fixing a wage for braceros and for domestic workers employed by the employers of braceros and requiring the payment of this wage as a condition to the employment of braceros.[1/] In effect the court held that there is no distinction between an administrative action of determining an existing fact, i.e., the prevailing wage, and making an administrative decision thereon, and the legislative action of fixing a minimum wage,[2/] and that the Secretary of Labor, under the authority granted him in Section 503 of Public Law 78, may in his discretion do either.

1/Opinion of trial court, p. 2, l. 6-11; p. 8, l. 1-19.

2/The government conceded that the adverse effect wage is a minimum wage fixed by the Secretary of Labor under authority properly granted by Congress in Public Law 78. Appellees' Br. p. 38-39. In view of this concession it cannot be argued that the adverse effect wage is not a minimum wage, but is only a criteria by which adverse effect is determined.

2. This decision is in direct conflict with the conclusions of the courts in Johnson v. Kirkland, 290 F.2d 440, and Dona Ana County Farm & Livestock Bur. v. Goldberg, 200 F. Supp. 210.[3/] This decision is further in direct conflict with the long established principles of constitutional law as enunciated by the Supreme Court of the United States in Opp Cotton Mills v. Administrator, 312 U.S. 126, and Schechter v. U. S. 295 U.S. 495. Even assuming that the trial court meant that the Secretary of Labor had the discretionary authority to determine the level at which the prevailing wage must be to prevent adverse effect, the decision is equally in error for all the reasons heretofore stated.

3. In their action the appellants raised some extremely important constitutional questions involving the extent of the authority of an administrative official acting under the authority of an Act of Congress. There are many parties vitally interested in the answers to these questions, and previous attempts had been made to obtain final answers to these questions in Johnson v. Kirkland, supra, Rio Hondo Harvesting Assn. v. Johnson, 290 F.2d 471, and McBride v. Johnson, 290 F.2d 475, but in each case the Secretary of Labor frustrated efforts to obtain decisions on these questions, and so the issues have remained unresolved.[4/]

4. The decision of this Honorable Court in affirming the judgment of the court below "on the basis of

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3/The trial court seemingly cited with approval both of these cases and quoted them at considerable length.
4/In each of these cases the Secretary of Labor successfully imposed the defense of the lack of an indispensable party.

that court's opinion" leaves all of these questions unanswered and places the law in this area in a general state of confusion.

Undersigned counsel certify that this petition is not interposed for delay and that in their judgment it is well founded.

Dated March 11, 1964.

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